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Turning Congress into an Agency: The Propriety of Requiring Legislative Findings

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TURNING CONGRESS INTO AN AGENCY: THE PROPRIETY OF REQUIRING LEGISLATIVE FINDINGS

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Renewed interest in legislative findings is welcome. Debate over the potential role for such findings provides an occasion for reexamining the relationship between Congress and the judiciary. Thus, while the Supreme Court's surprising decision in *United States v. Lopez*[1] has prompted extensive discussion of the future of judicially enforced federalism limits, it also raises the question whether the judiciary should afford greater attention to the processes by which Congress enacts legislation.

In *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez,[2] Professor Philip Frickey examines the potential benefits and possible drawbacks of increased judicial reliance on legislative findings. Frickey suggests that, in appropriate cases, requiring legislative findings can promote a due process of lawmaking, ensuring that Congress deliberate more fully about the constitutional limits to its authority under the Commerce Clause.[3] He concludes that attention to legislative processes should carry over from the Commerce Clause context to questions involving individual rights.[4]

In *Lopez*, the Fifth Circuit invalidated congressional enactment of the Gun-Free School Zones Act in part because Congress had supplied no findings.[5] Only congressional say-so linked possession

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1. 115 S. Ct. 1624 (1995).

2. Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695 (1996).

3. *See id.* at 728.

4. *See id.* at 729.

5. 2 F.3d 1342, 1367 (5th Cir. 1993).

of a gun within one thousand feet of schools to interstate commerce. According to that court, congressional findings constitute a precondition to sustaining all controversial exercises of Congress's power under the Commerce Clause.[6] Once such findings are made, courts must defer "'if there is any rational basis' for the finding. . . . Practically speaking, such findings almost always end the matter."[7] For its part, the Supreme Court rested its holding of unconstitutionality on grounds other than the lack of congressional findings. Nonetheless, Justice Rehnquist commented for the majority that, "to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."[8] The concurring opinion, moreover, suggested that the result in *Lopez* might have been different had congressional findings existed elucidating the commercial character of the regulation.[9]

The attention afforded legislative findings is not new. The Supreme Court has considered and encouraged findings in prior cases implicating congressional power under the Commerce Clause.[10] Furthermore, the Supreme Court has directed legislatures to make findings in other constitutional contexts in order to satisfy enhanced scrutiny.[11] But the Court has never categorically called

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6. *Id.* at 1363-64 ("Courts cannot properly perform their duty to determine if there is any rational basis for a Congressional finding if neither the legislative history nor the statute itself reveals any such relevant finding.").

7. *Id.* at 1363 (citations omitted).

8. *Lopez*, 115 S. Ct. at 1632.

9. *Id.* at 1640 (Kennedy, J., concurring) (judicial invalidation would "stand[] unless Congress can revise its law to demonstrate its commercial character"). Indeed, Justice Souter in dissent cautioned that the Court's opinion portends greater stress on explicit legislative findings. *Id.* at 1654.

10. The Supreme Court had deferred to legislative findings in the Commerce Clause context in past cases. *See, e.g.*, Perez v. United States, 402 U.S. 146, 154-57 (1971) (upholding congressional power to regulate loan sharking); Board of Trade of Chicago v. Olsen, 262 U.S. 1, 86 (1923) (upholding Grain Futures Act).

11. Affirmative action is one prominent area in which the Supreme Court has required specific legislative findings. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995) (requiring Congress to justify affirmative action legislation with specific findings because "classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified"); Richmond v. J.A. Croson Co., 488 U.S. 469, 500-04 (1989) (legislatures "must identify that discrimination, public or private, with some specificity before they may use race-conscious relief"); *cf.* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) ("We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in

for findings to be made in support of all legislation raising constitutional questions; any such requirement unquestionably would fundamentally alter the relationship between the judiciary and the legislature.

Although I share Professor Frickey's cautious endorsement of required legislative findings, many questions remain unanswered. In particular, Frickey's analysis neither suggests a normative framework for analyzing the desirability of legislative findings, nor does it justify conferring upon the judiciary greater power to intrude into the internal processes of the legislature. The judiciary has infrequently asserted the power to scrutinize the path—as opposed to the results—of legislative deliberations.

In part I, I revisit the question of the benefits and costs of requiring legislative findings. To the extent that the requirement becomes anything more than an empty formality, requiring findings may denigrate the respect due a coordinate branch of government. Findings might transform the legislature into a type of administrative agency, monitored and controlled by the superintending judiciary. Judicial intervention could well result in excessive judicial power—as many suggest has been the case in the administrative law context—and might blunt needed legislative flexibility. At a minimum, required findings raise the cost of legislating by imposing a new layer of procedures upon Congress.

Nonetheless, the advantages of forcing Congress to articulate the basis of its exercise of jurisdiction may be considerable. Whenever heightened judicial review is appropriate, legislative findings arguably facilitate the judiciary's task. Legislative findings allow a court more effectively to gauge the strength of the government's interest in legislating. Courts encourage legislative findings as part of substantive review.

In addition, courts may encourage legislative findings as a form of proceduralist review even when disclaiming any active role in enforcing substantive restrictions on congressional power. Requiring legislative findings may be critical when courts, for a variety of reasons, choose not to review legislation for consistency with constitutional commands. The greater dialogue between the legislative and judicial branches, sparked by requiring findings, can only inure to the benefit of the public. Although imposing a re-

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the absence of judicial, legislative, or administrative findings. . . ."). In some contexts, the Supreme Court, while not requiring findings, has deferred to them when present. *See infra* text accompanying notes 21-22.

quirement of findings adds costs to the legislative process, moderating change when constitutional principles are underenforced by the judiciary may well be justified. At the same time, such findings may enhance public monitoring of the legislative product by reducing the cost to the public of understanding legislation.

Given that required findings would not bring unalloyed benefits, the normative question of when the judiciary should impose such requirements—which Frickey avoids—is critical. I briefly address that issue in part II. Although legislative findings may be useful in all contexts in which courts demand a higher showing of governmental interest, I focus here on contexts in which courts have underenforced a constitutional norm whose elaboration should not be left to Congress alone. In fleshing out an analogy to the non-delegation doctrine, I tentatively conclude that judicial scrutiny of legislative processes in such contexts is beneficial if no other way exists to protect the constitutional norm. Required findings represent a less intrusive step than full-fledged review, and—despite the drawbacks—may facilitate a collaborative effort to develop constitutional principles in contexts in which independent judicial rules are normatively unattractive.

I.

Requiring the legislature to make findings supporting the need for legislation likely strikes many as problematic. Why should the constitutionality of an enactment of Congress turn on boilerplate rendition of the factual premises underlying the legislation? Our tradition of rational basis review reflects a reluctance to probe the actual reasons underlying legislation.[12] In the Gun-Free School Zones Act context, Congress presumably could have, and later did (albeit in sketchy fashion),[13] summarize the connection between

12. *See, e.g.*, FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2102 (1993) (Congress need not "articulate its reasons for enacting a statute."); Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 703 (1981) ("This Court has wisely 'never insisted that a legislative body articulate its reasons for enacting a statute.'" (citation omitted)); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." (citation omitted)).

13. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 320904, 108 Stat. 2125 ("[T]he occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country; . . . this decline . . . has an

gun possession near schools and interstate commerce. Justice Breyer's dissenting opinion in *Lopez* draws a roadmap.[14] He notes that the problem of guns in schools is widespread; twelve percent of urban high school students reportedly have had guns fired at them. Studies have concluded that violence in schools substantially interferes with the academic mission. And, the link between education and industrial productivity is relatively clear: technological proficiency facilitates commerce.[15]

Drafting findings, therefore, to demonstrate the link between other federal legislation and interstate commerce should not prove intractable.[16] Congress need only assign some skilled staffer the role of demonstrating the factual underpinnings of the federal regulation. Although judges on review can ensure that factfinding be based on empirical evidence,[17] enterprising staffers should be able to surmount any such obstacle. To compound the problem, legislative findings—like legislative history generally—may not be taken seriously by members of Congress,[18] undermining the case for

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adverse impact on interstate commerce and foreign commerce of the United States.").

14. *See Lopez*, 115 S. Ct. at 1659-60 (Breyer, J., dissenting).

15. *Id.*

16. For example, the Freedom of Access to Clinic Entrances Act of 1994 has been uniformly upheld in part due to specific findings demonstrating a nexus with interstate commerce. *See, e.g.*, United States v. Wilson, No. 95-1871, 1995 U.S. App. LEXIS 37375, at *12-13 (7th Cir. Dec. 29, 1995) ("These [congressional] findings are plainly rational, and the first three reveal the regulated activities' substantial relation to interstate commerce."); Cheffer v. Reno, 55 F.3d 1517, 1520 (11th Cir. 1995) (stating that "extensive legislative findings support Congress' conclusion that the Access Act regulates activity which substantially affects interstate commerce"); American Life League v. Reno, 47 F.3d 642, 647 (4th Cir.) ("Based on an extensive legislative record, Congress rationally concluded that violence, threats of force, and physical obstructions aimed at persons seeking or providing reproductive health services affect interstate commerce."), *cert. denied*, 116 S. Ct. 55 (1995).

The federal carjacking statute has also been upheld in part because of legislative findings. *See, e.g.*, United States v. Bishop, 66 F.3d 569, 579-80 (3d Cir. 1995) ("Congress specifically found that auto theft is an interstate problem. . . ."); United States v. Garcia-Beltran, 890 F. Supp. 67, 71 (D.P.R. 1995) ("The legislative history of the Act discusses the congressional view that the passing of the carjacking statute was necessary due to the impact carjacking had on interstate commerce."); *see also* United States v. Sage, No. 3:95cr108(DJS), 1995 U.S. Dist. LEXIS 15798 (D. Conn. Oct. 3, 1995) (upholding Child Support Recovery Act of 1992, 18 U.S.C. § 228).

17. *See* Frickey, *supra* note 2, at 713-16. Because the findings in the Violent Crime Control Act do not rely on any empirical basis, they are not entitled to deference.

18. The current skepticism towards legislative history stems in part from doubt whether members of Congress even consider committee reports, prints, and the like prior to voting on a bill. Such reports, as well as statements by the bill's sponsors and opponents, may reflect little more than interest group-inspired efforts to persuade judges years later of a bill's meaning, despite the common understanding at the time. For valuable discussions,

encouraging such findings even more. Why should it make a difference whether a staffer does the research, or a law clerk as in *Lopez*?

But legislative findings—according to the traditional justification[19]—may play a constructive role in aiding judicial review of legislation based on empirical judgments. Unlike Justice Breyer, many judges may not have devoted the resources to determining whether gun possession near schools in fact has a substantial impact on interstate commerce. Careful empirical work by legislatures can persuade judges of connections to interstate commerce that may have seemed a stretch at first glance. Judges are not well situated institutionally—irrespective of Justice Breyer's efforts—to assess independently the impact of a social problem on interstate commerce. Congressional findings of fact obviously cannot create a sphere of federal power where none exists under the Constitution; yet such legislative findings might prove quite helpful in demonstrating a link between legislative regulation and interstate commerce that may not be intuitive. Findings may thus facilitate judicial review.[20]

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see Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295 (1990), Orrin Hatch, *Legislative History: Tool of Construction or Deconstruction*, 11 HARV. J.L. & PUB. POL'Y 43 (1988), and Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371.

19. *See, e.g.*, United States v. Lopez, 115 S. Ct. 1624, 1631-32 (1995); Maine v. Taylor, 477 U.S. 131, 151-52 (1986) (deferring to legislative findings in determining necessity for ban on importation of live baitfish into Maine); Perez v. United States, 402 U.S. 146, 154-57 (1971) (deferring to Congress's judgment that extortionate credit transactions substantially affected interstate commerce); *see also* Henry W. Bikle, *Judicial Determinations of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6, 19 (1924) (judicial reliance on legislative factfinding may be appropriate if the legislature has "set forth . . . the basis of fact upon which [the legislation] rests."); Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 200 (1971) (discussing the allocations of functions between the legislative and judicial branches); Kenneth L. Karst, *Legislative Facts in Constitutional Adjudication*, 1960 SUP. CT. REV. 75, 111 (emphasis on legislative facts provides a way out of decision-making difficulties); Wendy M. Rogovin, *The Politics of Facts: 'The Illusion of Certainty,'* 46 HASTINGS L. REV. 1723, 1729 (1995) (concluding that, although legislative findings might aid the judicial task, requiring legislative findings is only suitable for "a narrow class of cases that could better be handled by overtly heightening scrutiny").

20. When Congress builds a record, as it has, for instance, under the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248, the Anti Car Theft Act of 1992, 18 U.S.C. § 2119 (the federal carjacking statute), and the Child Support Recovery Act of 1992, 18 U.S.C. § 228, the task of reviewing courts is lightened. Instead of speculating as to the connections between the regulation and interstate commerce—as Justice

Indeed, courts have relied on legislative factfinding in other contexts when carefully scrutinizing an enactment because of constitutional concerns. For instance, dormant Commerce Clause jurisprudence often depends on whether a challenged state regulation has legitimate safety and health effects.[21] Commercial speech regulation may turn on the need to protect consumers from confusion or misrepresentation.[22] Although courts should not rely on congressional resolution of legal issues embedded in such legislation, they have deferred to the superior factfinding ability of a coordinate branch of government. Similarly, factual findings as to the impact of a proposed regulation on interstate commerce can help illuminate any subsequent constitutional challenge. The traditional institutional justification therefore modestly supports encouraging—though not necessarily requiring—greater legislative findings.

When the factual issue concerns a political entity's jurisdiction, some might argue that less judicial deference to legislative factfinding is appropriate.[23] Most political entities strive to maximize their own power and reach.[24] Facts bearing on congressional regulation at the margins of Congress's Commerce Clause jurisdiction might therefore be more suspect than those involved in regulation of matters—such as the air waves—that fall comfortably within Congress's power to regulate, even if implicating First Amendment questions.[25] Although others might argue that it is impossi-

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Breyer did in the *Lopez* dissent—courts rather can rely on the empirical bases demonstrated in the congressional findings. Most would agree that Congress has better factfinding capabilities than do courts. Thus, directing Congress to build a record can streamline—and sharpen—the judicial task of reviewing federal legislation.

21. *See, e.g.*, C & A Carbone, Inc. v. Clarkstown, 114 S. Ct. 1677, 1683 (1994) (inquiring into health and environmental safety reasons for a waste control ordinance favoring a local business); Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 705-09 (1981) (inquiring into safety reasons for state rule burdening national trucking companies).

22. Posados de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 333-34, 341 (1986) (upholding regulation of casino gambling advertising aimed at Puerto Rico citizens in part because the Court had "no difficulty in concluding that the Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a 'substantial' government interest").

23. *Cf.* Cass R. Sunstein, *Law and Administration after* Chevron, 90 COLUM. L. REV. 2071, 2097-2100 (1990) (arguing that deference to agency determinations regarding agency jurisdiction is unwarranted).

24. *Cf.* WILLIAM NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971) (developing the thesis that agencies strive to maximize own jurisdiction and budget).

25. *See, e.g.*, Turner Broadcasting Sys. v. FCC, 114 S. Ct. 2445 (1994) (upholding "must carry" laws with regard to cable operators); United States v. Edge Broadcasting Co., 113 S. Ct. 2696, 2704 (1993) (upholding federal laws prohibiting lottery advertise-

ble to distinguish congressional measures that increase federal jurisdiction from those merely extending legislation into new areas,[26] some skepticism toward jurisdictional factfinding is warranted. Nonetheless, even when Congress's jurisdiction is questioned, legislative factfinding may be of some benefit to courts if the empirical basis is carefully demonstrated.

A. *Some Drawbacks of Judicial Intrusiveness*

But even if congressional findings can help the judiciary as a theoretical matter, requiring the legislature to make findings appears to denigrate the respect due a coordinate branch of government. Mandating legislative findings—rather than simply deferring to any empirical bases that Congress has provided—raises the ante considerably.

In exercising the power of judicial review,[27] courts have long respected the internal workings of Congress. Only recently, for example, courts have refused to review claims that the House ille-

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ments in non-lottery states while permitting advertisements in lottery states); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 117 (1989) (discussing the prohibition of indecent and obscene interstate telephone messages); *cf.* FCC v. League of Women Voters of Cal., 468 U.S. 364, 402 (1984) (holding that a ban on editorializing on public broadcast stations is unconstitutional).

26. *Cf.* Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 381 (Scalia, J., concurring) (arguing that no less deference than usual should be afforded agency construction of a statutory term that expands the agency's own jurisdiction); Oklahoma Natural Gas Co. v. Federal Energy Regulatory Comm'n, 28 F.3d 1281, 1284 (deferring to the agency "because of the difficulties of drawing a manageable and principled line between jurisdictional and other issues"). The Supreme Court, however, has seemingly afforded agencies less deference when jurisdictional issues are at stake, even when ostensibly deferring. *See* Presley v. Etowah County Comm'n, 502 U.S. 491, 510 (1992) (holding that the phrase "with respect to voting" that triggered requirements in the Voting Rights Act of 1965 did not encompass changes to the authority of county commissioners); Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361, 375 (1986) (invalidating the Board's regulation which interpreted the word "bank" in the statutory grant of authority).

27. The institution of judicial review itself is at times controversial. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 1-34 (1963) (discussing the establishment, justification, and limitation of judicial review); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 14 (1977) (discussing the impact of legal and moral obligations on judicial decision-making); JOHN HART ELY, DEMOCRACY AND DISTRUST 6-9 (1980) (discussing the undemocratic characteristics of judicial review); JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 4-12 (1980) (discussing the conflict between a majoritarian democracy and judicial review). Yet judicial scrutiny of legislation to ensure consistency with the Constitution has been accepted in some form since *Marbury v. Madison* and before. *See, e.g.*, Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792). The power of judicial review stems from the judiciary's checking function within our system of separated powers.

gally imposed upon itself a supermajority requirement for income tax raises.[28] In the past, courts have dodged claims by members of Congress that challenge whether a quorum existed when a law was passed;[29] whether the law was properly authenticated by the presiding officers of each House;[30] and, more recently, whether committee assignments are appropriate.[31] Similarly, the Supreme Court has refused to entertain the merits of a claim that the Senate used improper procedures to try a judge for impeachment.[32] These instances reflect the traditional wisdom that courts should respect the procedures utilized by a coordinate branch of government.

Requiring legislative findings threatens to alter the delicate balance between legislative and judicial power. The incremental steps towards an increased judicial role are not hard to imagine. Courts might exercise the power not only to require findings, but to determine what type of findings are appropriate. Courts could remand for insufficient findings, and signal what type of empirical bases they think sufficient. In short, required findings may transform Congress into a type of administrative agency subject to the control of the superintending judiciary.

Experience with judicial review of administrative agency policymaking reflects the impact that judges can have through the power to require findings. The Administrative Procedure Act (APA) provides that every decision in an on-the-record proceeding must include a statement of "findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discre-

28. *E.g.*, Skaggs v. Carle, 898 F. Supp. 1, 3 (D.D.C. 1995) (dismissing challenge to House rule requiring that any income tax increase be passed by three-fifths of its members).

29. *E.g.*, United States v. Ballin, 144 U.S. 1, 5-6 (1892) (declining to second-guess congressional rules for determining quorum).

30. *E.g.*, Field v. Clark, 143 U.S. 649, 672-73 (1892) (declining to determine whether an Act had been passed in its "precise form"). Courts have held Origination Clause challenges justiciable, but have afforded such claims little scrutiny. *See, e.g.*, United States v. Munoz-Flores, 495 U.S. 385, 399 (1990) (upholding Act that originated in the Senate that raised money for the Crime Victims Fund); Millard v. Roberts, 202 U.S. 429, 436 (1906) (denying challenge to statute originating in the Senate that "incidentally" created revenue) (citation omitted).

31. *E.g.*, Vander Jagt v. O'Neill, 699 F.2d 1166, 1175-76 (D.C. Cir. 1983) (rejecting challenge to committee allocation system); *cf.* Michel v. Anderson, 14 F.3d 623, 632 (D.C. Cir. 1994) (rejecting challenge to voting rights conferred upon delegate from the District of Columbia).

32. Nixon v. United States, 113 S. Ct. 732, 739 (1993) (holding such challenge nonjusticiable); *cf.* Dillon v. Gloss, 256 U.S. 368, 373 (1921) (according Congress wide latitude in proposing amendments under Article V).

tion presented on the record."[33] Judges review informal (notice-and-comment) rulemaking under the APA's arbitrary and capricious standard.[34]

In the first part of this century, review of agency policymaking was quite deferential—any agency policymaking that had the semblance of rationality was upheld.[35] But, with the increasing growth of the administrative state, judges began to review policymaking under the arbitrary and capricious standard more exactingly.[36] By forcing agencies to make detailed findings, judges soon played a far greater role in shaping the administrative process.

Under so-termed "hard-look" review,[37] courts now require agencies to explain their rationales in considerable detail, and to supply the courts with an extensive factual record supporting their chosen policy. Thus, in *Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,[38] the Court invalidated a Department of Transportation rule revoking a prior requirement that all new cars be equipped with a passive restraint system, including as one option automatic detachable seatbelts.[39] The

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33. 5 U.S.C. § 557(c)(3)(A) (1994). In SEC v. Chenery Corp., 318 U.S. 80 (1943), Justice Frankfurter explained for the Court,

> That the scope of such review is narrowly circumscribed is beside the point. For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review. . . . [T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.

Id. at 94.

34. 5 U.S.C. § 552.

35. *See, e.g.*, Pacific States Box & Basket Co. v. White, 296 U.S. 176, 186 (1935) ("[W]here the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes . . . and to orders of administrative bodies."). *See also* American Trucking Ass'n v. United States, 344 U.S. 298, 314-15 (1953) (deference remains even if the agency takes a position contrary to its earlier position).

36. *See generally* Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 512 (1985) (arguing that the courts assumed a greater role to "ensure the *protection* of those for whom Congress has expressed special solicitude" (emphasis in original)).

37. The Supreme Court rejected lower courts' efforts to impose upon agencies new procedures that were not mandated by the APA. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 523-25 (1978). *See generally* A. Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345 (addressing whether Congress, if not the courts, should impose additional procedures upon agencies). Nevertheless, courts accomplished a similar result by combing more carefully through the agency's factual findings and rationales for action.

38. 463 U.S. 29 (1983).

39. *Id.* at 57.

agency had supplied detailed findings supporting its conclusion that mandating detachable seatbelts would not be cost-effective given the limited safety benefits forecasted.[40] Indeed, prior studies had shown that even customers who paid extra for mandatory seatbelts nonetheless detached them.[41] But the Court was not convinced.

For another example, in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*,[42] the Supreme Court rejected OSHA's proposed limit on exposure to benzene in the workplace.[43] The dissent accused the plurality of being "both extraordinarily arrogant and extraordinarily unfair."[44] According to the dissent, the plurality was arrogant because it "presume[d] to make its own factual findings with respect to a variety of disputed issues."[45] The plurality was unfair because the agency had "gathered over 50 volumes of exhibits and testimony and offered a detailed and evenhanded discussion of the relationship between exposure to benzene" and health risks.[46] The case illustrates that required findings do not guarantee an agency any measure of deference.

Activist judicial review of administrative action has thus opened courts to two related attacks, each of which may be relevant in the context of legislative findings.

First, through arbitrary and capricious review, judges have arrogated to themselves the agencies' policymaking function.[47] Courts have substituted their views of the optimal seat-belt policy or regulatory strategy to control carcinogens in the workplace[48] for those of the agencies.

Second, apart from giving vent to judicial policy preferences,

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40. *Id.* at 53-56.

41. *Id.* at 53 n.16. The Court also struck down the rule because the agency failed to consider the option that mandating each car to be equipped with airbags could provide sufficient safety benefits to warrant the cost. *Id.* at 46-51.

42. 448 U.S. 607 (1980).

43. *Id.* at 662.

44. *Id.* at 695 (Marshall, J., dissenting).

45. *Id.* However, the findings were dicta because the Court had previously determined that the agency used the wrong legal standard. *Id.* at 652-59.

46. *Id.* at 696 (Marshall, J., dissenting).

47. *See, e.g.*, R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 1-5 (1983); JEREMY RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY (1989).

48. *See, e.g.*, Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 630 (1980) (upholding the invalidation of OSHA carcinogen standards based on "inappropriate findings"); AFL-CIO v. OSHA, 965 F.2d 962, 975 (11th Cir. 1992) (invalidating air contaminant standards for 428 substances).

judicial review has imposed significant costs on agency policymaking. More stringent review has caused agencies to shift increased resources into creating a record—marshalling empirical data and responding to opposing arguments. As R. Shep Melnick summarized, "[s]ince agencies do not like losing big court cases, they reacted defensively, accumulating more and more information, responding to all comments. . . . The rulemaking record grew enormously, far beyond any judge's ability to review it."[49]

Some agencies have avoided rulemaking for fear both of the additional costs and potential judicial reversals.[50] Commentators have decried the "ossification" of rulemaking that is a byproduct of more intrusive judicial review.[51] Even when judges do not impose their own values on agencies, judicial review substantially can affect the pace and quantity of agency regulation.

Required legislative findings might have similar disadvantages. Any such requirement imposes additional costs on the legislative process, making it more expensive to enact legislation. As a consequence, Congress might have a greater incentive to pass laws that they know judges will favor, or might instead respond—as have some agencies—by failing to act. Such inaction might harm the public.

In short, requiring legislative findings increases the cost of legislating and insinuates judges into the legislative process. The administrative agency parallel has amply demonstrated the perils of permitting judicial procedural review. The question to resolve, therefore, is whether the risk of expanding the judiciary's power over Congress outweighs the possibility that legislative findings might aid the judiciary because of Congress's superior factfinding powers.

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49. R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 247 (1992).

50. *See, e.g.*, JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990) (detailing how the NHTSA virtually abandoned rulemaking in the wake of adverse rulings); JOHN MENDELOFF, THE DILEMMA OF TOXIC SUBSTANCE REGULATION: HOW OVERREGULATION CAUSES UNDERREGULATION (1988).

51. *See generally* Thomas O. McGarity, *Some Thoughts on Deossifying the Rulemaking Process*, 1992 DUKE L.J. 1385 (commenting that, because the process of rulemaking has become increasingly burdensome in the past 15 years, agencies have responded by conducting fewer rulemakings); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995) (evaluating doctrinal changes that might deossify the agency rulemaking process).

B. *Some Advantages of Requiring Legislative Findings*

When courts closely scrutinize the legislature's product, such as in affirmative action or First Amendment cases, encouraging legislative findings facilitates the courts' substantive review. Whether that advantage outweighs the risk of increased judicial interference in the legislature's realm may depend on a variety of contextual factors. Mandating (as opposed to encouraging) findings would only be appropriate when exceptional safeguards are needed to ensure the legitimacy and probity of the governmental interests at stake.

In the Commerce Clause context, requiring legislative findings to help the judiciary assess the impact on interstate commerce seems excessively intrusive. The connection between congressional regulation and interstate commerce is often self-evident. Moreover, even when the link is not apparent, Justice Breyer's example in *Lopez* suggests that the Court can engage in limited factfinding proficiently enough. Courts might on occasion defer to persuasive legislative findings,[52] but invalidating legislation when such findings do not exist appears unwarranted. The Commerce Clause context does not call for such strict review.

But the course charted by the Fifth Circuit in *Lopez*—mandating findings—may rest on a different foundation. The justification for requiring legislative findings in *Lopez* stems not from the need to facilitate judicial review, but rather from an antecedent failure of judicial review.

Many believe that the Supreme Court has underenforced the Commerce Clause restrictions on congressional authority for a mixture of institutional and political reasons. In terms of institutional restraints, judges struggled with different doctrinal tests in an effort to distinguish permissible from impermissible regulations affecting interstate commerce. At times, for instance, Justices demanded that the effect on interstate commerce be direct as opposed to indirect.[53] Some Justices required that the regulated activity be in the "current of commerce."[54] Still others asked whether regula-

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52. Because the Supreme Court's decision in Lopez applies a form of heightened scrutiny, *see* 115 S. Ct at 1653-54 (Souter, J., dissenting), legislative findings could have played the traditional role of helping to persuade the Court of empirical connections that were not immediately intuitive. And so the majority stated. *Id.* at 1632.

53. *See, e.g.*, Coronado Coal Co. v. UMW, 268 U.S. 295, 310 (1925) (stating that regulated conduct must have a direct effect on commerce).

54. *See, e.g.*, Stafford v. Wallace, 258 U.S. 495, 509 (1922).

tion of the activity was pretextual.[55] And some attempted, much like the majority in *Lopez*, to exclude some categories such as manufacturing from the definition of "commerce."[56] The tests in conception were arguably misconceived and in operation extremely malleable.[57] Part of the reason for the Supreme Court's retreat in the 1940s[58] likely stemmed from the Court's prior failure to devise a workable test to circumscribe congressional authority.

In addition to the problems with finding a workable test, the Supreme Court's retreat from activist review no doubt stemmed from a political belief that centralized regulation was inevitable. Given the interplay of economic forces, Justices may have determined that political rather than judicial checks were all that should restrain Congress from extending its jurisdiction. As a consequence of such institutional and political factors, therefore, the Court underenforced[59] a constitutional norm that historically had been considered critical in cabining congressional authority.

When courts decline to enforce constitutional norms actively, requiring legislative findings signals concern for the constitutional value. Procedural review, in other words, represents a second-best solution to the problem of unconstrained legislative power. Imposing such additional transaction costs may force Congress to be more cautious and deliberate in fashioning legislation at the margins of its Commerce Clause authority. Arguably, Congress should proceed at a more deliberate pace when the Court has disclaimed ultimate responsibility for enforcing constitutional limitations.[60]

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55. *See, e.g.*, Champion v. Ames, 188 U.S. 321, 365-66 (1903) (Fuller, C.J., dissenting) (questioning Congress's motive in regulating the carriage of lottery tickets).

56. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 11-18 (1895) (attempting to narrow and confine Congress's commerce power).

57. *See, e.g.*, Robert L. Stern, *The Commerce Clause and the National Economy*, 59 HARV. L. REV. 645, 647 (1946) (discussing the Supreme Court's inconsistencies in reviewing federal legislation directed at economic issues); *cf.* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-4 (2d ed. 1988) (summarizing Congress's power to regulate interstate commerce).

58. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 118 (1942) (allowing Congress to extend its commerce power to self-consumption of crops by a farmer); United States v. Darby, 312 U.S. 100, 113 (1941) (extending Congress's commerce power over manufacture of goods).

59. *See* Lawrence Sager, *Fair Measure: The Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212, 1213 (1978) (commenting that, although some constitutional norms are not upheld because of institutional concerns, these norms are nevertheless valid).

60. Debate over the propriety of judicial selection of which values to enforce is inevitable. *See* William N. Eskridge & Philip P. Frickey, *Quasi-Constitutional Law: Clear*

Required legislative findings may also promote greater deliberation as to the wisdom of congressional regulation affecting constitutional interests. To be sure, members of Congress may relegate responsibility to craft such findings to staffers. But in some cases, the need to make findings may itself prompt greater debate as to what kind of findings to place in the statute. Indeed, in the exceptional case, legislation may not only be slowed but altered due to the difficulty members of Congress (or staffers) have in making a convincing nexus between the conduct to be regulated and interstate commerce.

In this respect, required findings operate like clear statement rules of statutory construction, which the Court has applied—albeit not always consistently—when reviewing legislation that trenches upon Tenth[61] and Eleventh Amendment concerns.[62] The Court will not interpret a statute to invade a core state function or subject a state to suit in federal court in the absence of a clear statement.[63] A clear statement approach adds costs to legislation, but at the same time, may prompt Congress to deliberate more forthrightly about the wisdom of such legislation.[64] As the Court stated in *Gregory v. Ashcroft*, the clear statement rule ensures "that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."[65]

Congress arguably should not pursue legislation at the margins of its Commerce Clause authority unless it has broad-based political support. Preserving state authority may be too important a value to leave to Congress without such assurance. Findings, like clear statement rules, help ensure that congressional action imping-

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Statement Rules as Constitutional Lawmaking, 45 VAND. L. REV. 593, 598-610 (1992) (discussing rules and presumptions that guide constitutional interpretation).

61. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 456-71 (1991) (using a clear statement approach, in light of Tenth Amendment concerns, to determine whether Congress intended to apply the Age Discrimination in Employment Act to state judges).

62. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (in light of Eleventh Amendment concerns, using a clear statement approach to determine whether Congress waived the states' immunity from suit).

63. *See id.* at 239-40; *Gregory*, 501 U.S. at 460-61 (labeling the rule a "plain statement rule").

64. *See generally* Eskridge & Frickey, *supra* note 60, at 597 (arguing that the Supreme Court in the 1980s created the strongest clear statement rules and thereby created "a domain of 'quasi-constitutional' law in certain areas") (no citation in original); John C. Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771 (discussing the increased use of clear statement rules by the Supreme Court and proposing a framework to determine which values should receive such treatment).

65. 501 U.S. at 461 (citations omitted).

ing on federalism concerns are a product of reflection and deliberation.

Moreover, requiring a record opens up the legislative process to greater public scrutiny. Individuals can better assess the basis for congressional action at the margins of federal authority. When the link (or lack thereof) between the commerce power and the Gun-Free School Zones Act or the Freedom of Access to Clinic Entrances Act is better understood, citizens can hold their representatives more accountable for their actions. In essence, legislative findings reduce the cost to the public of understanding and then monitoring their legislative agents' actions.

The potential benefits from requiring legislative findings—increased transaction costs, greater deliberation, and decreased monitoring costs—may seem speculative, or at least too insubstantial when weighed against the seeming affront to congressional dignity. Treating Congress as a glorified administrative agency cuts against our system of government, which embraces the norm of majoritarian rule through the democratic process.

Arguably, however, courts should superintend Congress when the meanings of constitutional provisions are at stake. Members of Congress have the obligation to interpret the Constitution,[66] but it has long been accepted that the interpretations of courts gain precedence in properly drawn cases and controversies. Requiring findings is consistent with the respect owed judicial interpretation of constitutional provisions. The requirement signals attention to what the courts have deemed a constitutional value, while leaving the substance of legislative regulation largely intact. Requiring legislative findings in appropriate contexts, therefore—as Frickey suggests[67]—may be consistent with our system of separated powers.

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66. *See* Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 747 (1985) ("Members of Congress have both the authority and the capability to participate constructively in constitutional interpretation."); *see also* Neal E. Devins, *The Supreme Court and Constitutional Democracy*, 54 GEO. WASH. L. REV. 661, 662 (1986) (book review) ("Congress and the executive are undoubtedly authorized to interpret the Constitution."); Michael S. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221 (1994) ("The power to interpret law is not the sole province of the judiciary; rather, it is a divided, *shared* power not delegated to any one branch but ancillary to the functions of all of them within the spheres of their enumerated powers.") (emphasis in original).

67. Frickey, *supra* note 2, at 729-30.

II.

But, to assert that legislative findings may be helpful when courts have underenforced a constitutional norm does not suggest that courts should require findings in all of such circumstances. Frickey never delimits when findings should be required; yet he states that there is nothing unique about Commerce Clause cases that would preclude encouraging findings in other contexts.[68] Indeed, he suggests that greater attention to legislative processes would also have been appropriate in *Heller v. Doe*,[69] a case involving a challenge to Kentucky's involuntary commitment procedures.[70] Although Kentucky's scheme unquestionably disadvantaged the developmentally disabled as compared to the mentally ill, the Court afforded the classification rational basis scrutiny.[71] Frickey suggests that *Heller* warranted heightened judicial scrutiny in view of the classification at stake. He does not specify whether the heightened review should have been directed at the substance of the legislation or at the legislative process. Moreover, Frickey does not explain his further conclusion that requiring findings would never be appropriate in cases implicating economic interests. If Frickey endorses heightened review in *Heller*, why not as well in *Dolan v. City of Tigard*,[72] which considered (under somewhat heightened scrutiny) the exactions that municipalities can impose on landowners wishing to change the use of their land?[73]

To illustrate the normative quandary, I turn again briefly to the administrative law context. The problem of inadequate legislative processes arises not only with respect to legislation impinging on state sovereignty, but also with respect to massive delegations of authority from Congress to federal agencies. Many commentators believe our system is profoundly undemocratic because so much critical policy is fashioned by unelected bureaucrats.[74]

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68. *Id.*

69. *Id.*

70. 113 S. Ct. 2637 (1993).

71. *Id.* at 2642 ("We many times have said . . . that rational basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" (citation omitted)).

72. 114 S. Ct. 2309 (1994).

73. *Id.* at 2312.

74. *See, e.g.*, DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 99-106 (1993) (condemning the undemocratic nature of legislative delegations); Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power*, 36 AM. U. L.

A. *Nondelegation Doctrine*

Historically and conceptually, many comparisons exist between the nondelegation doctrine and that of enumerated powers. Both doctrines circumscribe federal legislative power and thereby serve important structural values. While Commerce Clause limitations safeguard state power and our system of federalism, the nondelegation doctrine assures accountability for the lawmaking that legitimately takes place at the federal level. Indeed, the nondelegation ideal becomes even more important once Commerce Clause restrictions on legislative authority are relaxed.

Courts enforced both sets of limitation in the first part of this century. The Supreme Court not only struck down some applications of federal antitrust laws[75] and federal liability schemes[76] as beyond Congress's Commerce Clause authority, but it also invalidated statutes that were clearly within federal power on the ground that Congress had delegated too much authority to agencies. The Court's nondelegation doctrine requires that the legislature articulate an "intelligible principle to which the [agency] . . . is directed to conform"[77] in order to satisfy the constitutional command that "[a]ll legislative powers herein granted shall be vested in a Congress."[78] If such a principle exists, then judges can use that as a guide to cabin agency action. For instance, in *United States v. L. Cohen Grocery Co.*,[79] the Court invalidated a statute making it a crime to charge unjust or unreasonable prices for necessities.[80] The Court concluded that Congress abdicated its responsibility by failing to fix a clear standard of guilt.[81]

In the 1930s, the Supreme Court struck down the same New Deal legislation on both Commerce Clause and nondelegation grounds. In *A.L.A. Schechter Poultry Corp. v. United States*,[82] the Court invalidated the National Industrial Recovery Act[83] because

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REV. 295, 321 (1987) (concluding that our system resembles serfdom because of its dependency on patronage).

75. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1 (1895); *see also* Hammer v. Dagenhart, 247 U.S. 251 (1918) (invalidating child labor laws).

76. *See* The Employers' Liability Cases, 207 U.S. 463 (1908).

77. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

78. U.S. CONST. art. I, § 1.

79. 255 U.S. 81 (1921).

80. *Id.* at 93.

81. *Id.* at 89.

82. 295 U.S. 495, 541-42 (1935).

83. ch. 90, 48 Stat. 195 (1933).

(1) there was insufficient connection between the working conditions at a Brooklyn slaughterhouse and interstate commerce, and (2) the Act authorized the President, without any guidelines, to approve codes of fair conduct for particular industries.[84] And, in *Carter v. Carter Coal Co.*,[85] the Court invalidated the Bituminous Coal Conservation Act of 1935[86] because the federal regulation of working conditions of employees involved in mining was outside the commerce power,[87] as well as because the Act delegated to private producers the power to set binding regulations for others in the industry.[88]

Similarly, the Court relaxed both sets of restrictions with the end of the New Deal. At the same time the Court in *Wickard v. Filburn*[89] greatly expanded upon Congress's Commerce Clause authority, it upheld in *Yakus v. United States*[90] the broad delegation by Congress to the Price Administrator under the Emergency Price Control Act of 1942.[91] Even though the Act directed the Administrator to fix prices which "in his judgment will be generally fair and equitable,"[92] the Court concluded that the standards were "sufficiently definite and precise"[93]—given the goals prescribed in the Act[94]—to enable a reviewing court to determine whether the Administrator followed congressional will. As in the Commerce Clause context, part of the reason for the judicial switch arose from judges' inability to structure a satisfactory test to distinguish legitimate from illegitimate delegations of authority.[95] Deter-

84. *Schechter Poultry*, 295 U.S. at 551.
85. 298 U.S. 238 (1936).
86. ch. 824, 49 Stat. 991 (1935).
87. *Carter Coal*, 298 U.S. at 310.
88. *Id.* at 311.
89. 317 U.S. 111 (1942).
90. 321 U.S. 414 (1944).
91. ch. 26, 56 Stat. 23 (1942).
92. *Yakus*, 321 U.S. at 420.
93. *Id.* at 426.
94. The Act's articulated purposes were, *inter alia*, "to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents . . . [and] to eliminate and prevent profiteering." *Id.* at 420.
95. *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 64-72 (1965) (addressing the difficulty of framing a judicial test to determine excessive delegations); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 135-36 (1994) (discussing the difficulties of applying the standard "test" for delegation); Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 393-403 (1987) (discussing the judiciary's limitations and inability to apply the delegation doctrine effectively); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1693-

mining what is an "intelligible" principle is elusive, and a certain amount of delegation may be inevitable.[96] Also, as in Commerce Clause cases, Justices may have abandoned enforcement in recognition of the need for administrative control of an increasingly complex and interrelated economy. The Supreme Court explained in *Mistretta v. United States*[97] that "our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate under broad general directives."[98] The Court has not struck down an enactment on delegation grounds since the 1930s.

Broad delegations today are commonplace.[99] The FCC has long awarded broadcast licenses according to the "public interest,"[100] and the ICC has set rates it deems appropriate for transportation carriers.[101] More recently, the Court has upheld delegations to the Attorney General to determine which drugs to list as controlled substances,[102] and to the United States Sentencing Commission to set mandatory sentencing guidelines.[103] The constitutional requirement that "[a]ll legislative powers herein granted shall be vested in a Congress"[104] has seemingly been ignored by the courts. The Court's test provides little beyond a "hint of a reserved power."[105]

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97 (1975) (discussing the difficulty of devising a more effective nondelegation doctrine).

96. *See* Harold J. Krent, *Delegation and its Discontents*, 94 COLUM. L. REV. 710, 724-30, 743 (1994) (book review) (arguing that no judicial test can prevent all delegation given the close connection among lawmaking, law interpretation, and law application).

97. 488 U.S. 361 (1989).

98. *Id.* at 372.

99. Pursuant to the *Chevron* doctrine (*see* Chevron, U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)), the Court has embraced wide-ranging delegations as a matter of routine. Under *Chevron*, the Court will defer to agency application and construction of congressional terms if (a) Congress has not spoken directly to the subject and (b) if the agency's elaboration is reasonable. *Id.* at 845. The assumption underlying *Chevron* is startling: when Congress does *not* make its intent known, the default is to allow agencies to make important policy choices, as long as courts deem such choices to be reasonable. *Chevron* cannot easily be reconciled with any nondelegation ideal.

100. *See, e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190, 216-17 (1943) (discussing the "public interest" criterion).

101. *See* Intermountain Rate Cases, 234 U.S. 476, 486-89 (1914); *cf.* Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 604 (1944) (upholding power to fix "just and reasonable" rates).

102. *See* Touby v. United States, 500 U.S. 160, 169 (1991).

103. *See* Mistretta v. United States, 488 U.S. 361, 371-79 (1989).

104. U.S. CONST. art. I, § 1.

105. JAFFE, *supra* note 96, at 85.

From time to time the Court has confined a broad delegation through statutory interpretation to protect a constitutional or important policy interest. For instance, in *Kent v. Dulles*,[106] the Court narrowly construed Congress's delegation to the Secretary of State of the authority to issue passports to prevent him from refusing to issue passports because of an applicant's Communist sympathies: "We would be faced with important constitutional questions were we to hold that Congress . . . had given the Secretary authority to withhold passports to citizens because of their beliefs or associations."[107] Similarly, in *Hampton v. Mow Sun Wong*[108] the Court refused to confer upon the Civil Service Commission the power to exclude resident aliens from working for the government, despite an expansive delegation of authority.[109] Much as in *Gregory v. Ashcroft*,[110] in other words, the Court has refused to read a statute as embracing certain controversial delegations in the absence of a clear statement from Congress.

But those occasions have been few and far between. In contrast, consider the more recent decision in *Rust v. Sullivan*.[111] There, the Court refused to narrow a delegation to the Secretary of Health and Human Services that made available Title X Public Health Service funds to entities providing family planning as opposed to abortion services.[112] In implementing the congressional directive, the Secretary promulgated a regulation that imposed a gag rule on Title X grantees and physicians who supervise Title X funds, preventing them from counselling about abortion, even when not directly providing such services.[113] Despite the lack of evidence that Congress had considered the First Amendment implications of the ban, the Court reached the merits of the challenge.[114] Cases approving of open-ended delegations, irrespective of whether they involve sensitive policy choices as in *Rust*, are the norm.

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106. 357 U.S. 116 (1958), *overruled in part on other grounds by* Regan v. Wald, 468 U.S. 222 (1984).

107. *Id.* at 130; *see also* Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980) (narrowing delegation to OSHA to regulate toxic substances only to the extent feasible in light of financial impact on the affected industry).

108. 426 U.S. 88 (1976).

109. *Id.* at 113, 116-17.

110. 501 U.S. 452 (1991); *see also supra* text accompanying notes 61-65.

111. 500 U.S. 173 (1991).

112. *Id.* at 178.

113. *Id.* at 179-80.

114. *Id.* at 190-200.

If judicial review is to be reinvigorated in Commerce Clause cases, therefore, why not in the nondelegation context as well? The nondelegation doctrine, like the doctrine of enumerated powers, has been historically underenforced. The interrelated history of the two doctrines suggests that, after *Lopez*, reappraisal in the nondelegation context is appropriate.

Change may be in the offing. The Supreme Court this term has accepted a nondelegation case for plenary review.[115] In *United States v. Loving*[116] the United States Court of Appeals for the Armed Forces[117] sustained the constitutionality of the President's promulgation of aggravating factors warranting imposition of the death sentence.[118] To complicate the issue, Congress never explicitly conferred such authority upon the President.[119] Coming on the heels of *Lopez*, *Loving* provides an occasion for the Court to reassess the wisdom of abdication of judicially enforced limits on Congress to prevent wholesale delegation of authority. And perhaps sensing the Court's signal in *Lopez*, one court of appeals shortly thereafter struck down an enactment on nondelegation grounds, relying in part on the 1930s cases.[120]

Nonetheless, the propriety of reinvigorated review in the nondelegation context is not immediately obvious. Some may question whether, in today's age of massive governmental programs, judges should play any role in enforcing the nondelegation doctrine—the norm may not be worth preserving.[121] Others might

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115. *See* Loving v. United States, 116 S. Ct. 39 (1995) (granting petition for writ of certiorari).

116. Loving v. United States, 42 M.J. 109 (C.A.A.F. 1995).

117. Formerly the United States Court of Military Appeals.

118. *Loving*, 42 M.J. at 291 (citing United States v. Curtis, 32 M.J. 252, 260-67 (C.M.A. 1991)).

119. The President promulgated the factors after the Court of Military Appeals invalidated the prior legislative scheme in United States v. Matthews, 16 M.J. 354 (C.M.A. 1983). In the wake of *Matthews*, Congress did not revisit the death penalty issue directly.

120. *See* South Dakota v. United States Dep't of the Interior, 69 F.3d 878 (8th Cir. 1995) (invalidating 25 U.S.C. § 465, authorizing federal acquisition of land "for the purpose of providing land for Indians").

121. *See, e.g.*, 1 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE 149-57 (2d ed. 1978); E. Donald Elliott, INS v. Chadha: *The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 173-74 ("When institutional reality refuses to accommodate itself to legal doctrine, eventually doctrine has to accommodate itself to reality."); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 492, 498-99 (1987) (stating that the "growth of legislative, presidential, and judicial control . . . call for an approach that takes changed circumstances into account, but at the same time reintroduces into the regulatory process some of the safeguards of

disagree but reach the same conclusion based on a belief that political actors adequately control the delegations that Congress makes.[122] Not every invocation of a constitutional norm should trigger heightened judicial scrutiny.

B. Determining When Legislative Findings Are Appropriate

The nondelegation analogy illustrates that the wisdom of affording greater judicial attention to legislative process in cases like *Lopez* turns on at least two interrelated factors.

The first focuses on whether plenary judicial review is appropriate.[123] Judges cannot always effectively fashion doctrine to safeguard constitutional values. Administrable standards may be wanting, or courts may wish to avoid conflict with coordinate branches.[124]

Moreover, the adequacy of political process protections may lessen the need for plenary review. Many believe, for instance, that sufficient safeguards protect against unreflective or arbitrary policy in both the Commerce Clause and nondelegation contexts.[125] Just as the Supreme Court in *Garcia* relied extensively on the political process safeguards for federalism,[126] so some commentators have stressed the political controls—Presidential supervision and post-delegation controls exerted by Congress—on congressional delegated authority.[127] If judicially crafted doctrine is elusive and politi-

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the original constitutional system").

122. *See infra* note 127 and accompanying text.

123. Some, however, believe that judicial review of substantive legislative outcomes is rarely warranted. *See, e.g.*, Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747 (1991).

124. The republican guarantee clause may be an example. *See* U.S. CONST. art. IV, § 4. *See generally* Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 118 (1912) (stating that "the provisions of § 4 of Art. IV of the Constitution do not authorize the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to Congress"); Luther v. Borden, 48 U.S. 1 (1849).

125. *See infra* text accompanying note 132.

126. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552-54 (1985); *see also* PHILLIP BOBBITT, CONSTITUTIONAL FATE 191-95 (1982); D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779, 804-960 (1982) (discussing federalism limits on Congress's powers in the context of *National League of Cities*); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 360 (stating that *Garcia*'s "main thrust is to reject the usefulness of the sovereignty-based analysis and to replace it with a focus on the nature of the political process responsible for making federalism-related decisions"). *See generally* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

127. *See generally* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make*

cal process protections exist, then courts ought to rely on that process to preserve the constitutional norms without subjecting Congress to unseemly judicial intervention.[128]

Second, when plenary judicial review is not warranted, we should inquire whether courts can nonetheless reinforce the political process to increase the likelihood that Congress will in fact consider the constitutional value at stake. Such reinforcement can take several forms, including clear statement rules and required fact finding. Some judicial role may be needed if the political process protections inadequately safeguard legislative consideration of the constitutional value—whether the value be Commerce Clause limitations, nondelegation of authority, or individual rights.

John Hart Ely and others have focused extensively on the political process,[129] but obviously no consensus has been reached as to when that process obviates the need for judicial review. Ely has called for reinvigorated enforcement of the nondelegation doctrine, but would trust the political process protections in the Commerce Clause context.[130] Indeed, in arguing for renewed application of the nondelegation doctrine, Ely has stated that with the demise of judicial enforcement "[c]oming along when it did, the nondelegation doctrine became identified with others that were used in the early thirties to invalidate reform legislation, such as . . . a restrictive interpretation of the commerce power. . . . It's a case of death by association, though."[131] Dean Choper, in contrast, is willing to rely on the political process in both contexts,[132] and others, no doubt, believe in an activist judicial role when either type of claim is present.[133] Ely and Choper agree that plenary re-

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Political Decisions, 1 J.L. ECON. & ORG. 81 (1985) (stressing the existence of presidential controls); Pierce, *supra* note 95, at 407-18 (arguing that supporters of the nondelegation doctrine underestimate the ability of the executive branch to keep agencies in line with democratic principles); Krent, *supra* note 96, at 745-47 (focusing on accountability resulting from executive branch supervision).

128. On the other hand, if the Supreme Court retreated from its activist stance in Commerce Clause and nondelegation contexts because it no longer believes that those values merit preservation, then attention to legislative processes in those contexts would be unwarranted.

129. For commentary on the judiciary's underenforcement of certain constitutional values, see *supra* text accompanying notes 53-66.

130. ELY, *supra* note 27, at 131-34.

131. *Id.* at 132-33.

132. CHOPER, *supra* note 27, at 171-90, 371-76.

133. *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1234-41 (1994) (lamenting the demise of both the nondelegation doctrine and the doctrine of enumerated powers).

view is critical when certain individual rights are at stake—most notably, Ely argues that the political process undervalues political activity by discrete and insular groups that have historically been subject to prejudice.[134]

In short, heightened attention to legislative processes, as the court of appeals manifested in *Lopez*, makes sense when some judicial response is warranted but full-fledged judicial review is problematic. Strong (though not irrefutable) arguments can be made that the Commerce Clause and nondelegation doctrines constitute two contexts in which such an intermediate approach would be beneficial. The Court in the first part of this century struggled in fashioning doctrines to limit Congress in both contexts. Indeed, a workable test distinguishing permissible from impermissible exercises of Commerce Clause authority or permissible from impermissible delegations may be difficult to fashion. But the principles at stake may be worth preserving, and attention to legislative processes may further that end.

Each constitutional context must thus be assessed to determine whether greater attention to legislative processes would be beneficial. Frickey ultimately may be correct, for instance, that the legislative process malfunctions when the rights of the developmentally disabled are at stake as in *Heller*, but functions robustly when economic rights are implicated.[135] Yet Frickey has offered no theory justifying heightened scrutiny in *Heller* on the ground that the Equal Protection claim in that context is underenforced,[136] or that political safeguards are insufficient. Conversely, he has not suggested why economic rights would not merit at least some type of intermediate scrutiny given the existence, but evident laxness, of substantive Due Process and Takings Clause doctrines. A framework linking underenforcement to the need to reinforce the political process remains to be articulated.

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134. CHOPER, *supra* note 27, at 60-128; ELY, *supra* note 27, at 135-79.

135. *See* Frickey, *supra* note 2, at 728-29.

136. As discussed previously, findings might prove useful if the Court actively enforced equal protection clause claims of the type in *Heller*. Findings might help courts examine the governmental interests at stake to determine whether they outweighed the individual interests implicated, much as in the First Amendment context. Congress can in any constitutional context help persuade the courts of the wisdom or necessity of its legislation.

CONCLUSION

Despite my criticism of Frickey's presentation, I want to conclude by stressing my basic agreement with his conceptualization of the role of legislative findings. Commerce Clause limitations on Congress's authority have been judicially underenforced, and perhaps wisely so. Requiring legislative findings helps fill that void, signalling greater legislative attention to substantive restrictions on congressional authority. A judicial stress on findings reflects an intermediate level of review focusing on process rather than substance. Similarly, the nondelegation doctrine has been underenforced. As in the Commerce Clause context, some greater attention to legislative processes is possible.[137] Requiring findings is not practical, but the courts can ensure that any delegation of constitutionally sensitive authority be explicit. The potential gains from encouraging dialogue between courts and Congress in both contexts override the risk of transforming Congress into an agency subject to judicial control.

137. I doubt, however, whether full-fledged resuscitation of the nondelegation doctrine is around the corner. Despite academic railings, judges generally trust agency policymaking. Courts recognize that, although the risk of capture exists, Congress has many ways of controlling delegation—for example, power of the purse, oversight hearings, and power to withdraw the delegation. Courts also have devised doctrines to police agency discretion. *See supra* text accompanying notes 33-46. Rigorously enforcing the nondelegation doctrine—except, perhaps, at the margin—would raise the cost of legislation considerably and embroil the judiciary in continual controversies with Congress.